

PACIFIC INTER-LINK SDN BHD

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v.

WILMAR TRADING PTE LTD & ORS

HIGH COURT MALAYA, SHAH ALAM

B

LIM YEE LAN J

[CIVIL SUIT NO: 22NCVC-456-2011]

10 FEBRUARY 2012

CIVIL PROCEDURE: *Pleadings - Striking out - Whether action disclosed reasonable cause of action, frivolous, vexatious and an abuse of process of court - Whether weak case ground to strike out pleading - Effect of failure to plead predominant intent to injure and particulars of unlawful means to insert impugned clause - Whether failure to plead ingredients to establish conspiracy fatal - Whether failure to plead material facts and particulars in statement of claim curable by process of discovery*

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CONTRACT: *Lock-out agreement - Enforceability - Whether clauses restricted plaintiff from trading - Whether predominant intention of lock-out clause to injure plaintiff - Whether plaintiff suffered loss as a result of lock-out clause*

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The first to fourth defendants filed their application in encls. 8, 10, 14 and 15 to strike out the plaintiff's claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ('RHC 1980'). The four applications arose out of the plaintiff's present suit against the four defendants in which the plaintiff claimed damages for tortuous and intentional interference with the plaintiff's economic interest and to injure its business by having committed unfair business practices to the detriment of the plaintiff. The plaintiff was an international trader of palm oil company incorporated in Malaysia. The first defendant ('D1'), a company incorporated under the laws of Singapore, was the largest global processor and merchandiser of palm oils and was the plaintiff's competitor. The second defendant ('D2') was a manufacturer of speciality oil fats and was engaged in physical and future trading of palm oil. The third defendant ('D3') and the fourth defendant ('D4') were brokers in the business of brokering palm oil contracts. D1 and D2 entered into 18 separate forward contracts for FOB sale of Malaysian RBD Palm Olein ('Palm Oil'). These contracts were facilitated by D3 and D4. All the 18 contracts contained lock-out clauses which the

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- A plaintiff claimed was intended to lock-out the plaintiff from trading palm oil because the plaintiff could not be in contractual relationship with any of the defendants from the said contract. The plaintiff pleaded that all the four defendants had, by the lock-out clause, conspired and combined together to wrongfully with
- B intent to injure the plaintiff's business interest by unlawful means. The plaintiff further contended that the said clause had injured the plaintiff's business and its reputation and had caused it to suffer damages. The plaintiff claimed that they had to pay inflated prices to secure alternative palm oil cargoes and suffered losses by
- C way of demurrage and lead fright which was paid to various ship owners due to the plaintiff's inability to secure cargoes timeously and also by giving discounted prices to retain their customers' confidence. The plaintiff pleaded that D3 and D4 knowingly provided substantial assistance for the said wrongful conduct
- D which caused the plaintiff to suffer damage and were jointly and severally liable in damages for conspiracy to injure with unlawful interference with the business and economic interest of the plaintiff. The defendants asserted that the said lock-out clause in the palm oil contracts was a commercial decision made solely for
- E the purpose of protecting its own legitimate business and economic interests. The defendants further contended that the plaintiff in its statement of claim had failed to demonstrate that the predominant purpose between D2 and D1, D3 and D4 to have the impugned clause was to cause injury to the plaintiff and those acts did cause
- F the plaintiff to suffer pecuniary loss. Therefore, the plaintiff's action ought to be struck out on the grounds that the plaintiff's pleading disclosed no reasonable cause of action, was scandalous, frivolous, vexatious and otherwise an abuse of the process of the court.
- G **Held (allowing defendant's application in encls. 8, 10, 14 and 15 with costs):**
- (1) As long as the pleadings disclosed some cause of action or raised a question fit to be decided by a judge, the mere fact that the case was weak and not likely to succeed was not a
- H ground for the pleading to be struck out. This was because the court was not concerned with the respective merits of the claim or defence. So long as the statement of claim disclosed a reasonable cause of action, however weak the claim was, the
- I claim could not be struck out. (para 30)

- (2) To succeed under the category of the tort of a predominant purpose to injure, the plaintiff had to demonstrate in its pleading that the predominant purpose between D2 and D1, D3 and D4 to have the impugned clause was to cause injury to the plaintiff and those acts did cause the plaintiff to suffer pecuniary loss. Similarly, under the category of conspiracy to injure by unlawful means, the plaintiff must plead detailed particulars of the unlawful means used by D1 and D2 to insert the impugned clause in the contracts between them. (paras 38 & 39) A B
- (3) Apart from the bare recital of the 18 palm oil contracts made between the defendants which incorporated the alleged lock-out clause as being offensive, the plaintiff failed to plead particulars of the unlawful means employed by D1 and D2 and *vice versa* when they inserted such clause into their contracts or the particulars of facts which constituted the purported predominant intent to injure the plaintiff. These general allegations could not prove D1 and D2 had the intention to temper with the free market and to monopolise the market against the plaintiff. (paras 46 & 47) C D E
- (4) The court looked at the evidence produced by the plaintiff in order to prove the predominant intent or purpose to injure or the unlawful means to injure. As required by O. 18 r. 7 of the RHC 1980, it was incumbent on the plaintiff to plead sufficient material facts and particulars in order to establish the elements based on the tort of conspiracy to injure and to enable the defendants to answer the plaintiff's claim. Apart from making general allegations of a combination between D1 and D2 to injure the plaintiff *vide* the alleged lock-out clause, the pleading was devoid of particulars necessary to establish all the elements premised on a claim of the conspiracy to injure. The mere reference to the lock-out clause could not sustain the plaintiff's cause of action based on the tort of conspiracy to injure. (paras 49, 52 & 53) F G H
- (5) Since the contract involved from 17 to 30 more other parties, the clause did not stop the other parties in the string to contract with the plaintiff. The plaintiff's statement of claim against D3 and D4 on the tort of conspiracy to injure stood defective as it had failed to plead any particulars of facts as I

- A to how D3 and D4 had abetted, aided or assisted D1 and D2 to injure the plaintiff by the said lock-out clause. As D3 and D4 were mere brokers of the 18 palm oil contracts between D1 and D2, they had not played any part in the formulation of the terms of the contract which were agreed upon by their principals and were not in the position to dictate the terms of the contract. A charge of conspiracy in a civil proceeding was regarded as a grave charge, the standard of proof which had to be established was a high one, commensurate with the seriousness of the charge and such allegations must be clearly pleaded and clearly proved by convincing evidence. All the constituent ingredients to make up conspiracy must be pleaded. On this ground alone, the claim for conspiracy failed and ought to be dismissed under O. 18 r. 19 of the RHC 1980. (paras 53, 56, 57 & 58)
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- D (6) The plaintiff's claim for damages was flawed as it had failed to plead the material facts and particulars to support and justify the figures of the claim. Since the plaintiff could plead the precise figure of the losses it had suffered as a result of the alleged lock-out clause, then it must surely mean that the plaintiff had with it the particulars and facts upon which it had relied upon in arriving at its figures which was incumbent on the plaintiff to plead. (paras 62 & 63)
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- F (7) Since the plaintiff had acknowledged that it was not aware of the lock-out clause until January 2011, its complaint that for the past five to six year's it had been forced to buy at artificially inflated prices could not stand to reason as the plaintiff could not have felt the effect of the alleged lock-out clause when it was not even aware of its existence. (para 64)
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- H (8) The plaintiff's contention that it was still in the process of discovery for more contracts between D1 and D2 which contained such lock-out clause and that it reserved the right to add to and refer to other contracts was misconceived. It was the duty of the plaintiff when it filed a claim for such a huge amount to ensure that all material facts and particulars necessary to establish its claim were pleaded in order to formulate a complete cause of action against the defendants. The court only looked at the existing pleading in the statement of claim to determine whether it was sufficient to sustain the plaintiff's present cause of action. Where the statement of
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claim was defective, it was not the responsibility of the defendants to apply for better and further particulars in order to assist the plaintiff to sustain or improve its pleading. The plaintiff's plea that it was still looking for further contracts and other potential parties to be brought in as parties in this suit smacked a fishing expedition which the court vigilantly guarded against. (paras 67, 70 & 71)

- (9) Having considered all pleadings, this was an appropriate case for the court to exercise its discretion to strike out the plaintiff's pleading and claim against all the defendants on the ground that the plaintiff's claim disclosed no reasonable or sustainable cause of action, frivolous, vexatious, an abuse of the process of the court and was flawed by virtue of O. 78 r. 2 of the RHC 1980. (para 72)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA (**refd**)

Abu Samah Omar v. Zainal Montel [2003] 1 LNS 501 HC (**refd**)

Adam v. Ward [1917] AC 309 (**refd**)

AIC Dotcom Sdn Bhd v. MTEX Corporation Sdn Bhd & 2 Ors [2009] 1 LNS 118 CA (**refd**)

Allied Arab Bank Ltd v. Hajar and Others (No. 2) [1988] 3 All ER 103 (**refd**)

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC (**refd**)

Chang Yun Tai & Ors v. Dataran Mantin Sdn Bhd & Ors [2010] 1 LNS 1982 HC (**refd**)

Crofter Hand Woven Harris Tweed Co Ltd & Others v. Veitch and Another [1942] 1 All ER 142 (**refd**)

Dato' Saizo Abdul Ghani v. Celcom (Malaysia) Bhd & Anor [2008] 10 CLJ 169 HC (**refd**)

Datuk Harris Mohd Salleh v. Datuk Mohd Shafie Hj Apdal & Ors [2009] 2 CLJ 682 HC (**refd**)

Ding Kuong Hing v. Wong Hua Seh [2011] 1 LNS 453 HC (**refd**)

Duta Arif Sdn Bhd & Ors v. Charterfield Development Corporation Sdn Bhd & Ors [2007] 1 LNS 415 HC (**refd**)

Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC (**refd**)

Hari Chand v. Daulat Ram AIR 1987 SC 94 (**refd**)

Iskandar Gayo & Ors v. Datuk Joseph Pairin Kitingan & Ors [1996] 3 CLJ 713 HC (**refd**)

Jarman & Platt Ltd v. L Barget Ltd and Others [1977] FSR 260 (**refd**)

- A** *Kinyo Coating (M) Sdn Bhd v. ICI Paints (Malaysia) Sdn Bhd & Anor* [2011] 6 CLJ 911 HC (**refd**)
Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd [1995] 1 CLJ 519 HC (**refd**)
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC (**refd**)
- B** *Lonrho Plc v. Fayed* [1991] 3 All ER 303 (**refd**)
Mogul Steamship Co Ltd v. McGregor, Gow & Co and Others [1892] 1 AC 25 (**refd**)
Mogul Steamship Co v. McGregor, Gow & Co and Others [1891-1894] All ER Rep 263 (**refd**)
- C** *OBG Ltd and Another v. Allan & Others; Douglas and Others v. Hello! Ltd and Others (No. 3); Mainstream Properties Ltd v. Young* [2008] 1 AC 1 (**refd**)
Raja Zainal Abidin Raja Takchik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC (**refd**)
- D** *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 3 CLJ 310 CA (**refd**)
Ravichanthiran Ganesan v. Azrin Mirzhan Kamaluddin [2010] 1 LNS 833 HC (**refd**)
Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA (**refd**)
- E** *Seagate Technology (S) Pte Ltd & Anor v. Goh Han Kim* [1995] 1 SLR 17 (**refd**)
Seagate Technology (S) Pte Ltd & Anor v. Heng Eng Li & Anor [1994] 1 SLR 534 HC (**refd**)
Shipley v. Todhunter [1836] 7 C & P 680 (**refd**)
Sim v. Stretch [1936] 2 All ER 1237 (**refd**)
- F** *Sorrell v. Smith and Others* [1925] All ER Rep 1 (**refd**)
Tan Seng Hin v. Editor of "See Hua Daily News" & Anor [2009] 7 CLJ 265 HC (**refd**)
Tapematic SpA v. Wirana Pte Ltd & Anor [2002] 4 SLR 953 (**refd**)
Thomas & Betts (SE Asia) v. Ou Tin Joon mentioned in Tapematic Spa v. Wirana Pte Ltd & Anor [2002] 4 SLR 953 (**refd**)
- G** *Thorne v. Motor Trade Association* [1937] AC 797 (**refd**)
Tiarasetia Sdn Bhd v. Yayasan Selangor & Anor [2010] 6 CLJ 830 HC (**refd**)
Tuan Haji Ishak Ismail v. Leong Hup Holdings Berhad & 5 Other Appeals [1996] 1 CLJ 393 CA (**refd**)
- H** *Ware and De Freville, Ltd v. Motor Trade Association and Others* [1921] 3 KB 40 (**refd**)
Yap JH v. Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC (**refd**)
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Legislation referred to:

Rules of the High Court 1980, O. 1A, O. 18 rr. 7, 12, 19(1)(a), (b),
(c), O. 78 rr. 2, 3

Defamation Act 1957, s. 5

*For the plaintiff - Muhammad Shafee Abdullah; (Mathew Kurien with him);
M/s Sativale Mathew Arun*

For the 1st defendant - Leonard Yeoh; M/s Tay & Partners

*For the 2nd defendant - Shanti Mogan (SY Liew with her); M/s Shearn
Delamore*

For the 3rd defendant - Olivia Loh Yuet Ling; M/s Gananathan Loh

*For the 4th defendant - Akberdin Abdul Kader (Harjinder Singh Sandhu with
him); M/s Akberdin & Co*

Reported by Sandra Gabriel

JUDGMENT**Lim Yee Lan J:****Application**

[1] Enclosures (8), (10), (14) and (15) are applications made by way of summons in chambers by the 1st to the 4th defendants respectively to strike out the plaintiff's suit pursuant to O. 18 r. 19 of the Rules of the High Courts 1980 ("RHC 1980") as well as under the inherent jurisdiction of the court.

[2] The 1st defendant (D1)'s application in encl. (8) is supported by an affidavit in support in encl. (8A) and an affidavit in reply in encl. (8D), and opposed by the plaintiff's affidavits in reply in encls. (8B) and (8D).

[3] The 2nd defendant (D2)'s application in encl. (10) is supported by an affidavit in support in encl. (10A) and an affidavit in reply in encl. (10D), and opposed by plaintiff's affidavits in opposition to its application in encls. (10B) and (10E).

[4] The 3rd defendant (D3)'s application is supported by an affidavit in support in encls. (14A) and an affidavit in (14C) in reply to the plaintiffs affidavit in encl. (14B) in opposition to its application.

- A [5] The 4th defendant (D4)'s application is supported by its affidavit in support in encl. (15A) and its affidavit in reply in encl. (15B) in reply to the plaintiff's affidavit in encl. (15C) in opposition to its application.
- B [6] All the defendants have filed their respective defence to the plaintiff's statement of claim and the plaintiff has also filed its reply to the defence of all the defendants. The submissions of learned counsel for all the parties are briefly summarised as follows.
- C [7] The 1st defendant (D1)'s application in encl. (8) is supported by an affidavit in support in encl. (8A) and an affidavit in reply in encl. (8D), and opposed by the plaintiff's affidavits in reply in encls. (8B) and (8D).
- D [8] The 2nd defendant (D2)'s application in encl. (10) is supported by an affidavit in support in encl. (10A) and an affidavit in reply in encl. (10D), and opposed by plaintiff's affidavits in opposition to its application in encls. (10B) and (10E).
- E [9] The 3rd defendant (D3)'s application is supported by an affidavit in support in encl. (14A) and an affidavit in (14C) in reply to the plaintiff's affidavit in encl. (14B) in opposition to its application.
- F [10] The 4th defendant (D4)'s application is supported by its affidavit in support in encl. (15A) and its affidavit in reply in encl. (15B) in reply to the plaintiff's affidavit in encl. (15C) in opposition to its application.
- G [11] All the defendants have filed their respective defence to the plaintiff's statement of claim and the plaintiff has also filed its reply to the defence of all the defendants.

Facts Giving Rise To Application

- H [12] The four applications arose out of the plaintiff's present suit against the four defendants in which the plaintiff claims damages against the defendants for tortuous and/or intentional interference with the plaintiff's economic interests and/or conspiracy to injure its business or trade and/or engaging in unfair competition and/or otherwise having committed unfair business practices to the detriment of the plaintiff and/or slander and libel impugning the plaintiff which the defendants, by themselves and/or through their agents and/or servants have brought about by their acts as pleaded in its statement of claim (SC).
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[13] Very briefly, the plaintiff's case against the four defendants as averred in its statement of claim can be summarised as follows: A

- (a) Plaintiff is a company incorporated in Malaysia and is an international trader of palm oil, shipping out annually about 2.3 million metric tonnes of palm oil products from Malaysia/Indonesia to customers in the East Mediterranean and Black Sea, Gulf, Red Sea, East Africa and South African markets/regions - see para. 1 of SC; B
- (b) D1, a company incorporated under the laws of the Republic of Singapore is, *inter alia*, a leading trader in the international market sectors and is a wholly owned subsidiary of Wilmar International Limited, Singapore which holds itself out as the largest global processor and merchandiser of palm and lauric oils and a major palm plantation owner and international trader of palm oil and is plaintiff's business competitor - see para. 2 of SC; C D
- (c) D2 is a producer/manufacturer of specialty oil fats and is actively engaged in the physical and future trading of palm oil - see para. 3 of SC; E
- (d) D3 and D4 are brokers and in the business of brokering palm oil contracts - see paras. 4 and 5 of SC;
- (e) D1 and D2 entered into about 18 separate forward contracts for FOB sale of Malaysian RBD Palm Olein (Palm Oil). These contracts were facilitated by D3 and D4; F
- (f) As these contracts constituted trading for forward sales of palm oil ("string contracts"), it is clear that these goods could be on sold and bought several times on a willing buyer willing seller basis in string transactions until the time for performance for the physical delivery of the goods was reached between the FOB buyer and the FOB seller in the string; G
- (g) All the 18 contracts contained, *inter alia*, the following clause ("lock-out clause"): H

Seller/Buyer Undertakes That Their Immediate Counter
Party Shall Not Be Pacific Interlink.
- (h) The plaintiff claims that the said lock-out clause is intended to lock-out the plaintiff from trading in palm oil; I

- A (i) This is because although the plaintiff was not in a contractual relationship with any of the defendants in respect of the above said palm oil contracts, the plaintiff had the natural expectation, like any other trader engaged in the trading system, to purchase or on sell in string transactions and/or
- B secure physical delivery of palm oil for supply to its customers in the international market sectors.
- C (j) Plaintiff pleads that all the four defendants have, by the lock-out clause, conspired and combined together to wrongfully and with intent to injure plaintiffs business interests by unlawful means;
- D (k) The lock-out clause injures the plaintiffs business in that it had to pay inflated prices to secure alternative palm oil cargoes for fulfilling its contractual commitments to its customers and also suffered losses by way of demurrage and lead freight paid to various ship owners and/or charterers arising from plaintiff's inability to secure cargoes timeously and/or by giving discounts to its customers to retain their custom and confidence - para. 15 of SC;
- E (l) In the case of D3 and D4, plaintiff pleads that D3 and D4 knowingly provided substantial assistance and/or aided and or abetted and/or participated and/or encouraged for rewards the aforesaid wrongful conduct of D1 and D2 in that D3 and
- F D4's role have contributed and/or caused the plaintiff to suffer damage and loss;
- G (m) In the premises, D3 and D4 are jointly and severally liable to the plaintiff in damages for conspiracy to injure and for unlawful interference with the business and economic interest of the plaintiff;
- H (n) Plaintiff also pleads that the words in the lock-out clause constitutes a grave libel and/or slander on the plaintiff and was defamatory of the plaintiff both in their natural and ordinary meaning as pleaded in para. 19 and by way of innuendo as pleaded in para. 20;
- I (o) Plaintiff pleads that the lock-out clause was defamatory of the plaintiff in the following manner:
- (i) has resulted in negative imputations being cast on the integrity and financial standing of the plaintiff's business reputation to third parties, in the industry or otherwise;

- (ii) connotes or otherwise carries with it the implication that the plaintiff is unworthy to be a palm oil trader in a market which ought to be a premised on a willing seller willing buyer basis. A
- (p) Plaintiff pleads that D1 and D2 published the words in the said lock-out clause to D3 and D4 and or other sellers or buyers in the string and *vice versa* and by such publication the plaintiff has been much injured in its credit and trading or business reputation and has suffered damage; B
- (q) In the premises the plaintiff claims against all the defendants jointly and severally as follows: C
 - (i) general damages for intentional interference with economic interest, conspiracy and demurrage claims in the amount of USD244,200,000 or such other amount as assessed by this court; D
 - (ii) general damages for libel, slander, disparagement and loss of business reputation to be assessed by the court;
 - (iii) punitive, aggravated or exemplary damages in the amount of USD200,000,000 or such other amount as this court deems just; E
 - (iv) publication of an apology in the national daily newspapers of both Singapore and Malaysia and in such trade magazines in terms to be approved by the plaintiff; and F
 - (v) temporary and/or mandatory injunction enjoining the defendants and each of them from making oral or written derogatory statements and/or undertake not to make the condition from the defendant's future contracts dealings, pre and post judgment interest and costs on a solicitor and own clients basis - see para. 29 of SC. G

Grounds Of Application H

[14] The four defendants' respective application under O. 18 r. 19 of the RHC 1980 is premised on the ground that the plaintiff's pleading as it stands (a) discloses no reasonable cause of action and/or (b) is scandalous, frivolous, vexatious and/ or (c) is otherwise an abuse of the process of the court and ought to be struck out on these grounds. I

A Submission By Counsel

[15] Learned counsel for all the parties had on the instruction of the court filed their respective written submission before the hearing which were supplemented by their oral submission during the hearing of the respective enclosures on 12 January 2012. The detailed submissions of learned counsel for all the parties are briefly summarised as follows.

On Claim Founded On Conspiracy To Injure

C [16] On behalf of D1, learned counsel Mr Leornard Yeow submits, *inter alia*, as follows:

- (a) Plaintiff's claim against D1 is scandalous, frivolous, vexatious and an abuse of the process of the court and clearly unsustainable and ought be struck out summarily under O. 18 r. 19(1)(a),(b) and/or (c) of the RHC 1980, *inter alia*, based on the grounds;
- (b) The plaintiff has failed to establish all the elements of the tort of conspiracy to injure, as follows:
- (i) an agreement between two or more persons;
- (ii) for the purpose of injuring the plaintiff;
- (iii) acts done in execution of that agreement resulted in damage to the plaintiff; and
- (iv) acts done in execution of that agreement must be without lawful justification or excuse (see *Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 at p. 245.
- (c) In other words, to prove a conspiracy to injure, plaintiff must establish either a predominant purpose to injure plaintiff's business interest by lawful means or to injure plaintiff's business interest by unlawful means;
- (d) In this case, there is neither a predominant intent on the part of D1 to injure the plaintiffs business and or to cause loss by unlawful means;

- (e) D1 did not employ any unlawful means in imposing the clause in the palm oil contracts entered into with D2. Neither did D1 use any unlawful means to interfere with the plaintiff's trade and economic interests; A
- (f) D1 has explained its defence and affidavits that its decision to insert the clause in its palm oil contracts with D2 was a commercial decision made solely for the purpose of protecting its own legitimate business and economic interest, bearing in mind that its ability to fulfil its contractual obligation with the buyer or seller may eventually be determined by the choice of the immediate counterparty; B C
- (g) D1 chose not to trade with the plaintiff in its palm oil contracts as a result of previous bad experience in dealing with the plaintiff, including difficulties encountered by D1 and Kuok Oils & Grains Pte Ltd (KOG), a company which was subsequently merged with D1 in 2008 and the difficulties by other traders in the palm oil industry, which include: D
- (i) Regular late payments whereby the plaintiff had breached the standard payment terms under the standard payment terms under the PORAM/MEOMA FOB contract and, *inter alia*, additional demurrage, rebirthing charges and late shipment penalty as a result of plaintiff's slow loading rate; E
- (ii) The plaintiff had also claimed for delay in the arrival of vessel, including storage charges against KOG, even those charges were not incurred; and F
- (iii) Difficulties encountered by KOG when there were delays in export documents as a result of the plaintiff being in the string. The plaintiff had also refused to confirm cargo readiness, refused to allow pre-shipment sampling on time and had slow loading rate. G
- (h) Since the predominant purpose of the clause was for the self-interest or protection of D1, and not to injure the plaintiff, hence the plaintiff's allegation of an intention to injure plaintiff could not be sustained (see *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman* [1996] 3 CLJ 695 at pp. 697-705); H
- (i) D1 further submits that since the predominant purpose of the clause was for the self-interest or protection of D1 and D2, this is not an unlawful purpose and therefore there is no I

- A conspiracy, even if the plaintiff accidentally suffers loss (see *Lonrho Plc v. Fayed* [1991] 3 All ER 303 cited in *Tiarasetia Sdn Bhd v. Yayasan Selangor & Anor* [2010] 6 CLJ 830;
- (j) Common law recognises and protects competition between each business which may involve each business taking steps to promote itself at the expense of the other and that far from prohibiting such conduct, the common law seeks to encourage and protect it, as was held in the English House of Lords case of *OBG Ltd and Another v. Allan & Others; Douglas and Others v. Hello! Ltd and Others (No. 3); Mainstream Properties Ltd v. Young* [2008] 1 AC 1 at p. 53. In that case the House of Lords also held that intent to harm is not enough and intentional harm of another's business is not itself tortious;
- (k) D1 also relies on the case of *Thorne v. Motor Trade Association* [1937] AC 797 at pp. 814 and 816 in which it was held as follows:
- Each member of the respondent Association is free in law either to supply or not to supply his goods to any particular to any particular individuals; hence he may lawfully exercise his freedom of choice by deciding not to supply his goods to any person named in the Stop List. An agreement ... not to supply the goods to persons whose names appear in the Stop List is also lawful, provided that the intent of the combination is to promote and protect the legitimate trade interests of the respondent Association and its members and is not a combination to injure.
- (l) The case of *Mogul Steamship Co Ltd v. McGregor, Gow & Co and Others* [1892] 1 AC 25 was quoted in *Thorne v. Motor Trade Association* at p. 816 to the effect that "The defendants were lawfully entitled to offer such terms as they thought fit to secure business, even though the result was to take business from the plaintiffs";
- (m) The fact that many other traders applied a similar term in their palm oil contracts, as evidenced by the cease and desist letter dated 11 January 2011 issued by plaintiff, is also a strong indication that D1 did not act out of malice to the plaintiff but had its own reasons for inserting the clause;
- (n) The principles upon which the courts considered in exercising its power under O. 18 r. 19 of the RHC 1980 are well settled. It is only in plain and obvious cases that recourse

should be had to the summary procedure under this rule (see *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7). The court may strike out a case even if it requires a long and elaborate hearing before the court can be satisfied that there is no cause of action (see *Tuan Haji Ishak Ismail v. Leong Hup Holdings Berhad & 5 Other Appeals* [1996] 1 CLJ 393);

- (o) The court also has an inherent jurisdiction to strike to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be (see *Raja Zainal Abidin Raja Takchik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; and
- (p) For the reasons given by D1 as stated, this is a plain and obvious case for the court to strike out the plaintiff's claim on the ground that it is obviously unsustainable, frivolous, vexatious and an abuse of the court process.

[17] Ms Shanty Morgan, learned counsel for D2, submits, *inter alia*, on behalf of D2 as follows:

- (a) It is trite law that the tort of conspiracy to injure comprises one of two categories, ie, either conspiracy to do an unlawful act which is actionable in itself without the proof of injury or conspiracy to injure by lawful means where the predominant purpose is to injure the plaintiff and which indeed cause injury to the plaintiff (see *Lonrho Plc*);
- (b) In this case, plaintiff in its SC relies on both categories of conspiracy to injure. Nevertheless D2 contends that plaintiff's claim as presently pleaded under both categories is misconceived in law and not sustainable;
- (c) The plaintiff pleads in para. 12 of the SC that D2 possessed a predominant purpose to injure the plaintiff by inserting the clause in its contracts with D1. In order to succeed under the category of a 'predominant purpose to injure, plaintiff will have to demonstrate in its pleading that the sole or predominant purpose between D2 and D1, D3 and D4 to have the said clause was to cause injury to the plaintiff and those acts did

- A cause the plaintiff to suffer pecuniary loss (see *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695; [1996] 2 AMR 3001 and *Seagate Technology (S) Pte Ltd & Anor v. Heng Eng Li & Anor* [1994] 1 SLR 534 HC, affirmed in the Court of Appeal decision in *Seagate Technology (S) Pte Ltd & Anor v. Goh Han Kim* [1995] 1 SLR 17);
- B
- (d) However, a perusal of the substance of plaintiff's claim of a conspiracy to injure between D1 and D2 is the existence of the clause in the 18 palm oil contracts between them.
- C Plaintiff's main contention is that the mere inclusion of the clause exposes D2 to liability for conspiracy to injure;
- (e) As a purported elaboration of the conspiracy to injure by unlawful act, plaintiff had in para. 13 of its SC also pleaded that D2 together with D1, D3 and D4 had engaged in an unfair competition practice to the detriment of the plaintiff and to monopolise the market;
- D
- (f) However, D2 submits that the inclusion of the clause does not give the plaintiff recourse for two reasons. Firstly, there is no Malaysian law, at least pre-January 2012 that prohibits parties from choosing with whom they wish to trade and with whom they do not. Pre-January 2012, Malaysian law does not prohibit D2 from regulating its own mode of carrying out its trade and activities according to its own discretion and choice.
- E
- F In *Mogul Steamship Co v. McGregor, Gow & Co and Others* [1891-1894] All ER Rep 263, the House of Lords held that it is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade in the absence of intimidation, obstruction, molestation, misrepresentation or fraud;
- G
- (g) Secondly, it has been held by the House of Lords in the English case of (*Sorrell v. Smith and Others* [1925] All ER Rep 1) that a clause which purports to do something that a party is legally entitled to do cannot become illegal if done by agreement of two or more, so long as no unlawful means, for eg, violence, threat of violence or fraud, was used and no action lies although damages to another ensues. Hence an agreement between D1 and D2 not to contract with the plaintiff as an immediate counterparty in a string transaction is not unlawful *per se* and therefore the clause by itself does not
- H
- I

constitute an actionable wrong. Hence, even if plaintiff contends that it suffered a loss by reason of the same, it is an irrelevant by-product of a legitimate commercial agreement and is not actionable;

- (h) In this case, D2 has pleaded that the primary purpose of the clause was to benefit D1 and D2's commercial interest and not to prejudice the plaintiff. D1 and D2 have the freedom to contract with whoever they want and they have the right not to deal with the immediate party who is, for example, a bad supplier, because it affects the entire string;
- (i) D2 has explained the purpose of the clause and it is simple one. The plaintiff always bought on credit and bought large quantities. Although interest was paid, with credit terms D2 would have cash flow issues, having to pay its seller promptly long before it received payment from the plaintiff. Hence D2 would have to advance payment to its counterparties whilst giving credit to plaintiff or choose not to trade with the plaintiff as a counterparty in a string. Thus, the purpose of the clause was to ensure the buying and selling were from parties which observed 'cash on delivery of documents' payment terms and not to injure the plaintiff;
- (j) One very important aspect which parties have to understand is that as far as a PORAM string contract is concerned, it is actually a long string and even learned counsel for plaintiff has mentioned in his submission that it can be up to 17, 20 even 25 or 30 parties. In this case, the impugned clause clearly states that the seller/buyer undertakes that their immediate counterparty shall not be Pacific Inter-Link. Immediate counterparty means, where D1 contracts with the D2, that the third party immediately after D1 or immediately after D2 should not be the plaintiff. Other than that, the clause does not stop the other parties from contracting with the plaintiff;
- (k) D2 has demonstrated in its affidavits that it has no personal ill-will towards the plaintiff (see *Mogul Steamship Co v. McGregor, Gow & Co and Others*). Indeed D2 has been contracting with plaintiff since 2008. Plaintiff chose to deal with D2 on a free-will basis as D2 provides high volumes of palm oil to the plaintiff with a lower rate of interest at 7% per annum compared to 18% per annum stipulated in the standard PORAM contract;

- A (l) The plaintiff attempts to raise issues by saying that it did not practice payment on credit was refuted by looking at the sums due from the plaintiff to D2. As at 2008, the total outstanding payment due from the plaintiff to D2 amounted to USD92,919,800.92. This demonstrates that firstly D2 did
- B trade quite extensively with the plaintiff and secondly, that the plaintiff did buy on credit. Hence, it would not be a fair statement or a true fact to say that plaintiff was locked out by the said clause;
- C (m) In this case, since the insertion of the clause falls within the principles of freedom to trade with whom D2 chooses, hence the plaintiff's purported reliance on the presence of the clause itself in the palm oil contracts as an unlawful act is misconceived and without basis in law;
- D (n) In fact, the plaintiff acknowledged it did not even know of the clause until January 2011. It is even more important to plead the particulars of why the clause was intended to injure the plaintiff in situations where the plaintiff claims to have no knowledge of the clause for five-six years. However no such
- E particulars have been furnished;
- (o) D2 submits further that in addition, the plaintiff's pleading as it stands is also flawed as disclosing no reasonable cause of action against D2 based on the tort of conspiracy to injure.
- F The plaintiff simply relies on the clause and the contracts made between D1 and D2 which had incorporated the clause as constituting a predominant purpose to injure. However, plaintiff fails to plead particulars of the alleged predominant purpose to injure nor is it clear why plaintiff assumes that was
- G the purpose or the intention of the clause;
- (p) In para. 15 of its SC the plaintiff pleads that it has suffered loss by having to pay artificially inflated prices to secure palm oil due to the impugned clause. In its affidavit in opposition
- H to the defendant's application to strike out, (see affidavit of Zulklifi bin Othman affirmed on 22 July 2011) plaintiff merely pleaded that D2 conspired with D1 to exclude the plaintiff from the string to enable D1 to sell the same goods to the plaintiff at inflated prices to the plaintiff's detriment and this
- I was done to ensure D1 enjoyed a monopoly in the palm oil market sectors and rendered the plaintiff uncompetitive;

- (q) However, the plaintiff fails to particularise why it says that these contracts (at inflated prices) were caused by the clause or provide a list of prices it paid for the palm oil due to the impugned clause. There is not one particular provided in the pleading of any occasion where the plaintiff attempted to buy from D2, was refused and then compelled again to buy the same product from D2 at an inflated price. There is also no plea of the plaintiff having complained to D2 about its dissatisfaction with the allegedly artificially inflated prices nor that the plaintiff was compelled to buy from D2 a particular batch of palm oil at artificially prices because it could not buy the stock at the market price. There were also no particulars in its SC on how the inclusion of the clause made it impossible for plaintiff to secure its palm oil trades; A B C
- (r) In other words, the plaintiff fails to plead in its SC material particulars and facts on how the clause was unlawful or why it is said that the clause was inserted with the predominant to injure. In the English case of *Allied Arab Bank Ltd v. Hajar and Others (No. 2)* [1988] 3 All ER 103, QBD, the court held that these defects in the pleading amounted to fundamental and incurable flaws; D E
- (s) In the English case of *Jarman & Platt Ltd v. L Barget Ltd and Others* [1977] FSR 260, the English court held that a charge of conspiracy in civil proceedings is generally to be regarded as a grave charge and that particularly where the allegation is made against persons of hitherto unblemished reputation, the standard of proof which has to be established before a court can properly hold that the charge established is a high one, commensurate with the seriousness of the charge and such allegation must be clearly pleaded and clearly proved by convincing evidence; F G
- (t) In the Malaysian case of *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman*, the defendants filed a motion for *certiorari* to quash the MPPJ's approval to certain development project within the green area. The developer claimed the *certiorari* was filed to injure the developer, ie, the six defendants had conspired with the fifth defendant therein to file the motion. His Lordship Mahadev Shanker J held that since the predominant purpose of the defendants was to further protect legitimate interest of their own, the allegation of a parallel intention of injuring could not be sustained unless the defendants used unlawful means. H I

- A It was further held that apart from the bare assertion of conspiracy based on the joint filing of the action, no particulars of any kind were alleged against these six defendants to show how they were linked to the misdemeanors alleged against the fifth defendant. His Lordship held that just as fraud must be
- B pleaded with great particularity, so also all the constituent ingredients going to make up conspiracy, must be pleaded. On this ground alone the claim for conspiracy fails. In the event the plaintiff's claim was dismissed under O. 18 r. 19 of the RHC 1980;
- C (u) Based on the decisions in *Gasing Heights Sdn Bhd* and *Jarman & Platt Ltd*, it is submitted that the plaintiff's claim is unsustainable and frivolous and vexatious and ought to be truck out under O. 18 r. 19 of the RHC 1980.
- D [18] Learned counsel for D3, Ms Olivia Loh submits, *inter alia*, on behalf of D3 in the following manner:
- (a) As pleaded by the plaintiff, D3 was brought in by virtue that it had brokered ten palm oil contracts between D1 and D2;
- E (b) D3 submits that the plaintiff's claim against D3 is misconceived;
- (c) As broker D3 acts as an agent on behalf of the principals to undertake sale and purchase transactions of palm oil products.
- F As in the ordinary course of business to act as broker D3 is deemed as a general agent for all its principals;
- (d) It is not in dispute that D3 as a broker and as an intermediary D3 merely brings a seller and buyer together. In
- G brokering the contracts D3 arranged for the sale and purchase of palm oil products based on the terms and conditions mutually agreed between the seller and buyer;
- (e) As D3 was not in a position to dictate, impose or determine
- H terms to the seller and buyer or how they ought to carry out their transaction. What D3 was required to do was to notify and communicate to the contracting parties the terms of the terms and conditions proposed and concluded;
- I (f) It is also trite that under the law of agency an agent is bound to act in accordance with the instruction of his principal and must obey all reasonable instructions of his principal. Hence, in this case, D3 as an agent is duty bound to express or

communicate any term D1 wishes in the palm oil contracts to D2 and *vice versa*. It is not the duty or responsibility of D3 as an agent to dictate or curtail any special conditions as agreed between D1 and D2; A

(g) It is also not in dispute that D3 had brokered ten palm oil contracts between D1 and D2 and all terms and conditions under the ten palm oil contracts were imposed by D1 and D2 on a willing buyer and willing seller basis; B

(h) Although the ten contracts carried the clause, the words of the clause were reflected as a term between D1 and D2 and the contracts were transacted between D1 and D2 in their own names as evidenced in D2's purchase orders (see encl. 1B, exh. "Z1LD3"); C

(i) Taking into account the role of D3 it is submitted that there can be no action against D3 for a conspiracy to injure either under the limb of unlawful means or predominant conspiracy to injure; D

(j) D3 is not a party to the contracts between D1 and D2 and does not have any interest in the palm oil transactions between D1 and D2. There is therefore absolutely no basis in the plaintiff's allegation of D3 aiding and abetting the conduct of D1 and D2; E

(k) D3 further submits that the plaintiff's pleading as it stands against D3 is flawed. This is because the plaintiff has not pleaded any particulars of overt acts as to how D3, acting as broker, had conspired in any manner whatsoever to injure plaintiff's business interest. In particular, plaintiff fails to plead the following particulars: F
G

(i) particulars of the overt acts as to how D3 had purportedly conspired to injure the plaintiff's business interest;

(ii) particulars of the purported intent or predominant purpose on the part of D3 in injuring the plaintiff's business interest; H

(iii) particulars as to how D3 purportedly aided, abetted or provided assistance to D1 and D2's alleged wrongful conduct; and I

(iv) particulars of the loss and damage alleged suffered by the plaintiff as a result thereof;

- A (l) It is submitted that the absence of these particulars is fatal to the plaintiff's claim against D3. This is because all allegations of conspiracy to injure must be pleaded with sufficient particulars, especially with regard to the overt acts of how D3 had intended or had the predominant purpose to injure the
- B plaintiffs business. As they are absent in the plaintiff's pleadings, its claim is liable to be struck out (see *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32, *Iskandar Gayo & Ors v. Datuk Joseph Pairin Kitingan & Ors* [1996] 3 CLJ 713; [1996] MLJU 140 and
- C *Chang Yun Tai & Ors v. Dataran Mantin Sdn Bhd & Ors* [2010] 1 LNS 1982; [2011] 3 MLJ 701);
- (m) In any case, the SC discloses no particulars against D3 of aiding and abetting D1 and D2.
- D [19] Learned counsel for D4, Encik Akberdin Abdul Kader submits *inter alia* on behalf of D4 as follows:
- (a) As rightly pointed out by the plaintiff, D3 and D4 are palm oil brokering houses and are not in the business of actual
- E purchasing and selling of palm oil;
- (b) The contracts entered into between D1 and D2 and brokered by D3 or D4 are entered into on a string contract basis whereby the items sold are sold a few times, beginning with
- F the first seller to the intermediary until a final contract is entered into with the final purchaser. This creates contractual duties and privity between parties who are dealing with the parties immediately before and after them. In short, this means that D4 has a duty to guard the interest of the immediate
- G party next to it failing which it will be liable for breach of contract;
- (c) D4 however did not deal directly with the plaintiff and there is no privity between them. Hence, D4 owes no contractual
- H duty to the plaintiff and this is acknowledged by the plaintiff in para. 10 of the SC;
- (d) As brokers, D3 and D4 were merely agents which brought D1 and D2 together in the string contracts. Neither D3 nor D4 were involved in the preparation or incorporation of the lock-out clause. They neither authored nor did they design the
- I contract, nothing whatsoever. In fact, as brokers D3 and D4 are not in the position to dictate or impose terms or even

curtail any terms which their clients wish to communicate to the other party are duty bound to express such terms between the buyer or the seller;

A

- (e) As such D4 it is absolutely baffled and stunned and at a loss as to why it was roped in as a party in this suit;

B

- (f) Plaintiff's suit against D4 is actually a bully tactic to instil fear on D4 and a back door tactic or a smokescreen to compel D1 and D2 through D4 to remove the alleged lock-out clause and to force parties to trade with the plaintiff although they do not wish to do so. In other words, the plaintiff's claim against D4 is not a genuine claim but is actuated by an oblique or ulterior motive and therefore an abuse of the process of the court;

C

- (g) In addition, as it stands, the plaintiff's SC is a defective pleading. Here plaintiff merely says that D3 and D4 assisted, encouraged and facilitated D1 and D2 but nothing more than that. The plaintiff fails to plead the pertinent particulars and material facts of what was the predominant intention of D4 and were the unlawful means employed by D4 to injure the plaintiff's business. They never said that the persons behind the lock-out clause were D3 or D4. In other words, how and by what manner D4 purportedly assisted, aided and abetted D1 and D2 in their conspiracy to injure the plaintiff were not particularised;

D

E

- (h) In the case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 3 CLJ 310, Abdul Malik Ishak JCA, in reliance on some Indian decided authorities, *inter alia*, *Hari Chand v. Daulat Ram* AIR 1987 SC 94, has held, *inter alia*, that in the absence of pleadings, any evidence if any adduced cannot be considered by the court and no party should be permitted to travel beyond its pleadings. All the necessary and material facts and materials should be pleaded in support of the case set up by the party and no evidence can be led of a fact that is not pleaded;

F

G

H

- (i) This is thus a classic case of an action that is obviously unsustainable against D4 based on the tort of conspiracy to injure.

I

A On The Claim Based On Defamation

[20] Submission on behalf of D1

- B** (a) The clause does not bear nor could it be understood to bear nor is it capable of bearing any of the meanings alleged by the plaintiff or any other meaning defamatory to the plaintiff;
- C** (b) In particular, the clause in its natural and ordinary meaning does not impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on its part;
- D** (c) A statement is capable of being defamatory in the absence of ill intention in their ordinary meaning. However, where an action is done within the lawful means to protect trade interests, as in the case of D1, it will not be actionable (see *Ware and De Freville, Ltd v. Motor Trade Association and Others* [1921] 3 KB 40 at p. 67);
- E** (d) There is no publication of the contract of sale of palm oil products between D1 and D2 to any third party. D1 did not publish circulate or publish the contracts in the palm oil market, whether internationally or locally. These contracts were merely made between D1 and D2 and copied to either D3 or D4 who acted as brokers, all of whom are parties to this suit;
- F** (e) In any event, even if there is publication, which is denied, the clause is true in substance and in fact based on the previous experience which D1 had earlier and D1 will rely on the defence of justification;
- G** (f) A communication is protected by qualified privilege if it is made in pursuance of a common interest shared by the maker of the statement and the person to whom the statement was made (see *Shipley v. Todhunter* [1836] 7 C & P 680 and *Adam v. Ward* [1917] AC 309);
- H** (g) In this case, the clause was imposed in the palm oil contracts in the protection and in furtherance of D1's legitimate interests and the clause was made to D2 who has a corresponding interest in the subject matter of the clause and
- I**

hence the defence of qualified privilege applies (see *Dato' Saizo Abdul Ghani v. Celcom (Malaysia) Bhd & Anor* [2008] 10 CLJ 169; A

(h) The fact that many other traders applied a similar term in their palm oil contracts as evidenced by the plaintiff's cease and desist letter dated 11 February 2011 to members of the international palm oil trade is also a strong indication that D1 did not act of malice to plaintiff but had its own reason for doing so; B

(i) In conclusion, it is submitted that the clause does not constitute a libel and or slander nor was it calculated to disparage and impugn the plaintiff in the local and international palm oil commodity markets; C

(j) D1 had since 26 January 2011 removed the condition complained of from all of its palm oil contracts after receipt of the plaintiff's cease and desist letter dated 11 January 2011 (exh. AKM1). Hence there is no longer any justification for plaintiff to seek injunction against D1; D

(k) Pursuant to a letter dated 28 April 2011 D1 had informed plaintiff's solicitors' that D1 was prepared, without admission of liability and its legal position, to give assurance to the effect that D1 will not make it a condition to exclude plaintiff as the immediate counterparty in their future contract dealings, however there was no response to D1's letter; E F

(l) D1 had removed the clause from its contracts since 26 January 2011 as a matter of *abundans cautela non nocet* (excessive caution) and removal of the clause is not in any way an admission of liability-or culpability on the part of D1; G

(m) Since D1 had removed the condition complained of from its palm oil trading contracts even before the commencement of the suit plaintiff should be stopped from proceeding with its claim against D1, including but not limited to the prayers for temporary injunction and permanent and or mandatory injunction, as it is an abuse of the process of the court. H

I

A [21] Submission on behalf of D2

- (a) The nature of the impugned clause by in itself is not defamatory. This is because it is a term in the palm oil contracts between D1 and D2 and a fact that their immediate party will not be Pacific Inter-Link and as a statement it is a true reflection of the intention of D1 and D2 which is to protect their own economic and business interest;
- B**
- (b) As a term of the contract naturally the clause had to be communicated between D1 and D2 to reflect their true intention but it was never communicated to other parties in the string who are not parties to the contracts. Hence, the question of the publication of the clause to other parties by D1 and D2 is absolutely without basis. The fact that the clause only comes to plaintiff's attention purportedly five or six years later shows that it is not widely practiced.
- C**
- D**

[22] Submission on behalf of D3

- (a) It is submitted that the words in the clause in its natural and ordinary meaning do not cast any imputation that would "lower the plaintiff in the estimation of right-thinking members of society generally". The clause merely states that the buyer/seller immediate party shall not be Pacific Link. This is in accordance with the parties' freedom to contract. No ordinary reader could possibly read it in the meaning as alleged by plaintiff (see *Sim v. Stretch* [1936] 2 All ER 1237 at p. 1240);
- E**
- F**
- (b) In regard to the claim based on tort of defamation, it is trite law that an action for defamation, special treatment must be given to the drafting of the SC (see *Abu Samah Omar v. Zainal Montel* [2003] 1 LNS 501; [2004] 5 MLJ 377);
- G**
- (c) With regard to alleged defamation by innuendo, the law requires plaintiff to plead with sufficient particulars of the facts and matters it intends to rely on to suggest that the words in the clause is capable of being defamatory other than its natural and ordinary meaning. It is submitted that plaintiff fails to plead in accordance with the rules (see O. 78 r. 3 of the RHC 1980, Malaysian Court Practice, RHC 1980 and *Tan Seng Hin v. Editor of "See Hua Daily News" & Anor* [2009] 7 CLJ 265 at p. 274);
- H**
- I**

- (d) In conclusion, it is submitted that the plaintiff's claim against D3 ought to be struck out in view that there is no reasonable cause of action against D3 and/or it is frivolous or vexatious or an abuse of the court. A

[23] Submission on behalf of D4 B

- (a) D4 contends that there is a fundamental defect or flaw in the plaintiff's pleadings. This is because the plaintiff has failed to plead the exact words of the impugned clause in its indorsement of writ as required by O. 78 r. 2 of RHC 1980, which reads as follows: C

Before a writ in an action for libel is issued it must be indorsed with a statement giving sufficient particulars of the publications in respect of which the action is brought to enable them to be identified. D

- (b) It has been held in a number of decided cases (see *Tan Seng Hin v. Editor of "See Hua Daily News" & Anor* [2009] 7 CLJ 265, *Datuk Harris Mohd Salleh v. Datuk Mohd Shafee Hj Apdal & Ors* [2009] 2 CLJ 682, *Kinyo Coating (M) Sdn Bhd v. ICI Paints (Malaysia) Sdn Bhd & Anor* [2011] 6 CLJ 911; and *Ravichanthiran Ganesan v. Azrin Mirzhan Kamaluddin* [2010] 1 LNS 833) that in a defamation action, the plaintiff must plead the exact words used by the defendant to drive home their claim, failing which it renders the writ a nullity pursuant to O. 78 r. 2 of RHC 1980 and is not curable; E F

- (c) In this case, the plaintiff has failed to specifically plead the exact words of the impugned clause in the writ itself. The clause was only reproduced in the SC which was served 14 days later on D4; G

- (d) In *Ding Kuong Hiing v. Wong Hua Seh* [2011] 1 LNS 453, it was held that the purpose of indorsing the writ with a statement giving sufficient particulars of the publication is for them to be identified. To put it in another way, it is to enable the defendants to know sufficiently the particulars of the publication in respect of which the plaintiff is suing the defendants; H

- (e) The court in that case held that even where the SC was annexed to and served together with the writ, but if the writ did not refer to the SC in its indorsement, then in such a case, merely annexing the SC to the writ will not cure the I

- A non-compliance. What more, in this case, the writ and statement of claim were not served together but in the case of D4, 14 days apart. Hence, it amounts to a failure to comply with O. 78 r. 2 and since the requirement of O. 78 r. 2 is mandatory, on this point alone the claim of the plaintiff
- B can be struck off;
- (f) In this case, the plaintiff has admitted that they have not reproduced in verbatim in the indorsement of writ the exact words of the impugned clause used by the defendants. Plaintiff
- C further contends that by virtue of O. 1A of the RHC 1980 the failure by the plaintiff in not reproducing the entire words of the defamatory statement is curable. It is submitted that this is not the law as could be seen from the decisions in the aforementioned cases. It is also clear that two of the cases
- D cited by D4 were decided after the introduction of O. 1A RHC 1980;

On Quantum

[24] Submission on behalf of D1

- E (a) On the issue of quantum, D1 takes a strong objection to plaintiff quantifying the amount of damages without any basis at all. All that the plaintiff has done in its SC was to make
- F general allegations that for past five-six years they have suffered losses of about USD244.2 million and for good measure also asks for punitive damages of another USD200 million. None of the documents before the court at this stage shows that plaintiff will be able to prove its loss during the trial;
- G (b) If as alleged by plaintiff general allegations of losses without specific details and particulars of the losses are sufficient for the purpose of pleading, then why stop at USD500 million, why not claim for USD250 billion or trillion for that matter?;
- H (c) D1 contends that to hit a large and reputable company like D1 with such an exorbitant amount without any basis at all and forcing D1 to report to its shareholders that it has a contingency liability of USD450 million smacks a bad intention on the part of the plaintiff and shows that the entire suit is
- I vexatious and scandalous and an abuse of the process of the court.

[25] Submission on behalf of D2**A**

- (a) On quantum of damages, D2 submits again the plaintiff's pleading as it stands is flawed as it is devoid of the particulars or material details of the alleged loss or damage suffered by the plaintiff; **B**
- (b) D2 disagrees with the submission of plaintiff's counsel that what D2 wants is evidence of the loss and or damages. D2 emphasises that the particulars and details of the loss or damages which D2 requires from the plaintiff are not matters of evidence but unfortunately are questions of fact; **C**
- (c) In particular, it is incumbent on the plaintiff, to plead the following material facts and details:
 - (i) the occasions on which plaintiff had requested to purchase palm oil from D1 and D2 but were refused by them between 2005 and 2011; **D**
 - (ii) the contracts which the plaintiff were forced to enter with third parties as a result of the refusal of D1 and D2 to sell palm oil to plaintiff; **E**
 - (iii) the alleged inflated price, etc, charged by the third parties compared to the price that the plaintiff could have gotten from D1 and D2 had they been able to purchase such palm oil from D1 and D2; **F**
 - (iv) why did the third parties charge such inflated prices for sale of palm oil to the plaintiff?; and
 - (v) was it because D1 and or D2 told them to do so, or were they threatened or intimidated by D1 and D2 to do so? **G**
- (d) These are matters of facts, and not evidence, which O. 18 r. 7 talks about, which the plaintiff is required to plead. Devoid of these material facts the pleading is bad in law and ought to be struck out; **H**
- (e) In this case, the only fact that plaintiff has pleaded in support of its claim is that because D1 and D2 refused to sell to plaintiff palm oil it had to buy at higher prices. If this case goes to trial the plaintiff will then have to say "I couldn't buy palm oil on day X at price X" and all the defendants are all going to stand up and object because there is no particulars **I**

- A of that in the pleading and defendants couldn't have prepared ourselves for that piece of evidence. In other words, the fact must come first before the plaintiff is allowed to lead the evidence. So, what D2 is saying is that save all that trouble at this stage and plaintiff cannot go to trial on this fact;
- B (f) The plaintiff also pleads that by having the clause they suffered serious financial hardship. Again this is a bare allegation which of course from the defendant side D2 will be able to prove that trade continues to happen. There is no evidence before this court today and there is nothing in the affidavits to show that the D1 and D2 intentionally went all the way to ensure the entire string of 30, 40 and 50 parties would have this clause. If there were, obviously these parties would have been parties to this suit;
- C
- D (g) Hence, plaintiffs pleading as it stands on quantum is flawed and has to go.
- [26] Submission on behalf of plaintiff and reply to defendants' submission.
- E Plaintiff's counsel, Dato Sri Muhammad Shafee Abdullah, submits on behalf of the plaintiff in the following manner:
- F (a) Plaintiff's claim against all the defendants is for damages and losses premised on the torts of conspiracy to injure and defamation suffered by plaintiff as a result of the lock-out clause which had injured the plaintiff's economic business interest and reputation as a major international palm oil trader;
- G (b) On the cause of action based on conspiracy to injure, as rightly pointed out by learned counsel for the defendants, the plaintiff is relying on both categories of conspiracy, ie, conspiracy by unlawful means and conspiracy based on predominant intent/purpose to injure;
- H (c) The plaintiff has complied with the rules in terms of pleadings where in various paragraphs of its SC, it has pleaded in detail all the elements of the tort of conspiracy to injure under both categories;
- I (d) Conspiracy by unlawful means has been pleaded in para. 11 in which plaintiff had pleaded that all four defendants wrongfully and with intent to injure the plaintiff's business and

- or to cause loss to the plaintiff by unlawful means conspired and combined together to lock-out the plaintiff from trading or obtaining physical delivery of the goods stated in the contracts whether in string transaction or otherwise by the use of the lock-out clause in the contracts stated in paras. 6 and 7 of the SC while conspiracy to injure is pleaded in para. 12; A B
- (e) Plaintiff had further elaborated on the nature of the unlawful means in para. 13 ie, that the lock-out clause was written by the defendants as a special condition to the standard PORAM FOB contract in the purchase of and sale of palm oil, as a deliberate scheme to lock-out the plaintiff or as part of an anti-competitive scheme and or to engage in unfair competition or to commit unfair business practices in order to monopolise and or wrongly dominate the relevant international market for the defendant's benefit and advantage, and conspiracy based on predominant intent/purpose to injure as alleged in para. 12; C D
- (f) The plaintiff has also pleaded the nature of the losses and injuries suffered as a result of the lock-out clause and the particulars of loss and damage as stated in para. 15; E
- (g) Hence as it stands the plaintiff's pleading on this tort is sufficient and complete in so far as D1 and D2 are concerned;
- (h) In regard to D3 and D4, plaintiff has pleaded that they are brokers which had facilitated the execution of certain palm oil contracts between D1 and D2; F
- (i) Brokers are not the actual buyers or the sellers but they are the marriage makers. They marry A and B in the sale and purchase or otherwise. Their names appeared in the sample contracts for instance in the case of D3 in exh. 'ZULD2'; G
- (j) The plaintiff has also pleaded in the alternative that D3 and D4 knowingly provided substantial assistance and/or aided and/or abetted and/or participated and/or encouraged for reward the aforesaid wrongful conduct of D1 and D2 as stated above in that D3 and D4's role have contributed and caused the plaintiff to suffer damages. By marrying the two parties, D3 and D4 were fully aware of these contracts between D1 and D2 and were fully aware of the tortuous element of locking out executed by the D1 and D2. Hence, if they were fully H I

- A aware that they had brokered these contracts which contained the lock-out clause, of course they had encouraged and abetted the entire clause. That is all that is needed to be pleaded;
- B (k) In regard to the cause of action based on tort of defamation, the plaintiff is relying on the defamatory nature of the lock-out clause based on both its natural or ordinary meaning stated in para. 19 as well as its defamatory meaning by way of innuendo as sets out in para. 20 of the SC;
- C (l) The plaintiff has also pleaded in para. 21 that there was publication of the lock-out clause from D1 to D2 to D3 and D4 and or other buyers/sellers in the string and alternatively D3 and D4 published the alleged lock-out clause to D1 and D2 and or other buyers or sellers in the string. On issue of quantum, this has been pleaded in para. 29 of the SC. So far as conspiracy to injure is concerned, the plaintiff has pleaded in detail the special damages suffered in para. 15 of the SC. As for damages for defamation, it is clear from s. 5 of the Defamation Act 1957 that in an action for slander in respect of words calculated to disparage the plaintiff in any trade or business, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his trade or business. Hence, plaintiff need not show exactly what is the quantum of damages suffered in terms of defamation which is the second cause of action in the same writ;
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- F
- (m) Hence, plaintiff's pleading on its claim both based on conspiracy to injure and for defamation is complete as it stands;
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- (n) It would appear from the defence and affidavits in support of their applications for striking out and the submission by respective counsel on their behalf, that the main complaint of all the defendants against the SC of the plaintiff is that it lacks particulars which plaintiff denies;
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- (o) The plaintiff contends that in reality what the defendants complained of are more in the nature of evidence which it is trite law it is not necessary for the plaintiff to plead in its SC at this stage of the proceedings;
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- (p) In any case, if indeed particulars are what required by the defendants, the usual thing should have been for them to write to the plaintiff to ask for whatever particulars they require and if the plaintiff unreasonably refuses the defendants could have gone under the process of discovery and interrogatories for further and better particulars; A B
- (q) As a matter of fact, the plaintiff itself is still in the process of discovery for more contracts which might contain such a locked-out clause and if need be the plaintiff will apply to amend its SC to plead further particulars and further losses it had suffered. However, as it stands the plaintiff's pleading in this suit is sufficient; C
- (r) It has been decided in a number of cases (see *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211; and *Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd* [1995] 1 CLJ 519; [1995] 1 MLJ 504) that it is only in plain and obvious cases that recourse should be had to the summary procedure of striking out under O. 18 r. 19 and this summary procedure can only be adopted when it can be clearly seen that a claim is on the face of it 'obviously unsustainable'. So long as the cause of action discloses some ground of action, the mere fact that the plaintiff's case is weak and is unlikely to succeed at the trial is no ground for striking out; D E F
- (s) In the cases of *AIC Dotcom Sdn Bhd v. MTEX Corporation Sdn Bhd & 2 Ors* [2009] 1 LNS 118; [2011] 3 MLJ 476 CA and *Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd* [1995] 1 CLJ 519; [1995] 1 MLJ 504 at 508 HC, it has been held that where there are defects in the pleadings resulting in the other party applying to strike out, and if an amendment can correct the defect, the court generally would not act summarily and leave under the rule will always almost be given; G H
- (t) In the case of *AIC Dotcom Sdn Bhd*, Gopal Sri Ram also held that a court which is moved to strike out a pleading has a separate and independent jurisdiction to direct an amendment to save the pleading *in lieu* of it being struck out; I

- A (u) In the present case, the plaintiff maintains that its pleading as it stands on both the torts of conspiracy to injure and defamation is complete and sufficient. However, if the court agrees with the defendants and thinks that the pleading has to be beefed up with further particulars, plaintiff will do so upon discovery of the particulars that are required;
- B
- C (v) Plaintiff contends that the fact that D1 and D2 have actually removed the lock-out clause after they received a notice of cease and desist from the plaintiff should work against them and is an issue which should go for trial as to their true intention or motive in inserting the said lock-out clause;
- D (w) In any case, there are conflicting positions taken by the parties herein, namely, the plaintiff and the rest of defendants, in so far as what was the predominant purpose/intent of D1 and D2 is concerned when they entered into the palm oil contracts to have this particular clause and on that score alone the matter should go for trial.
- [27] D1's reply to plaintiffs submission
- E (a) D1 takes issue with learned plaintiff's submission that the fact that the D1 and D2 have actually removed the lock-out clause after they received a notice to cease and desist should work against them. This is a totally unfair statement as what D1
- F has done by removing the impugned clause was excessive caution. It should not work against D1 and D2 nor prejudiced them. The fact that they actually took such measures was so as not to aggravate matters further;
- G (b) On learned counsel for plaintiff's submission that since there are conflicting positions taken by the parties namely the plaintiff and the rest of defendants in so far as what were the predominant purpose/intent of D1 and D2 when they entered into this agreement to have this particular clause and on that basis alone the matter should go for trial, D1 contends there
- H are no such authorities that say that just because different parties take different positions on a particular matter then the matter should go for trial. Obviously the plaintiff and defendant would not take the same position, otherwise they
- I wouldn't be seeing each other in court.

Finding And Decision

[28] Having carefully considered the pleadings of all the parties in this action and the cause papers relevant to the striking out applications, I am of the considered view that this is an appropriate case for this court to exercise its discretion to strike out the plaintiff's pleading and claim against all the defendants, on the ground, *inter alia* that the plaintiff's claim against the defendants discloses no reasonable or sustainable cause of action, is frivolous and vexatious and or an abuse of the process of the court.

[29] In coming to this decision, I have had the benefit of the detailed written and oral submissions of learned counsel for all the parties, as summarised above, to which I had given very serious consideration. Without wishing to detract or subtract from the respective submission of respective learned counsel for the parties in these applications, I wish to highlight the main grounds upon which I had upheld the defendants' applications and dismissed the plaintiff's claim.

[30] It is not in dispute and in fact a well settled law as established by various high authorities in this country (see, *inter alia*, *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 and *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457 and *Tuan Haji Ishak Ismail v. Leong Hup Holdings Berhad & 5 Other Appeals* [1996] 1 CLJ 393 that recourse to the summary process to strike out a claim under O. 18 r. 19 of RHC 1980 is to be had only in plain and obvious cases and the court's discretion to strike out a claim or defence is to be exercised only where a claim or defence is on the face of it "obviously unsustainable". Where such a summary procedure is resorted to by any party, what the court has to consider is whether the statement of claim or discloses some cause of action and, likewise, whether the statement of defence raises a reasonable defence, and as long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. This is because the court is not concerned at this stage with the respective merits of the claim or defence. Further in considering an application under O. 18 r. 19(1)(a), the court has only to consider whether the statement

- A of claim on the face of it discloses a reasonable cause of action and no consideration whatsoever shall be paid to the evidence in the form of affidavits. So long as the statement of claim discloses a reasonable cause of action, however weak the claim is, the claim cannot be struck off summarily.
- B [31] Having applied the principles laid down in the
C aforementioned leading authorities to the plaintiff's statement of
claim (SC) and the very detailed submissions of learned counsel for
all the parties in this case, I am of the considered view and agree
with the defendants that this is a plain and obvious case for me
to exercise my summary power to strike out the plaintiff's
statement of claim on the ground that it discloses no reasonable
cause of action, is frivolous and vexatious and an abuse of the
process of the court for reasons I shall state in the following
D paragraphs of my judgment.
- E [32] It would appear from its SC that the crux of the plaintiff's
claim against the four defendants is premised on 18 palm oil
contracts entered into between the D1 and D2, of which
ten were brokered by D3 and eight by D4, as particularised in
paras. 7 and 6 of the SC respectively all of which contained a
clause (alleged "lock-out clause") that reads as follows:
- Seller/Buyer Undertakes That Their Immediate Counter Party
Shall Not Be Pacific Interlink.
- F [33] It is also clear from its SC that the plaintiff's claim in its
present suit arising out of the said lock-out clause is premised on
two principal causes of action ie, (i) the tort of conspiracy to
injure and (ii) defamation.
- G [34] In regard to the tort of conspiracy to injure, it is not in
dispute by all the parties hereto that based on established case
law authorities (see, *inter alia*, *Sorrel v. Smith and Others* [1925] All
ER Rep 1, *Lonrho Plc v. Fayed* [1991] 3 All ER 303, *Crofter Hand
Woven Harris Tweed Co Ltd & Others v. Veitch and Another* [1942]
H 1 All ER 142, *Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991]
3 CLJ 2960; [1991] 4 CLJ (Rep) 243, *Gasing Heights Sdn Bhd v.
Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695 and *Tiarasetia Sdn
Bhd v. Yayasan Selangor & Anor* [2010] 6 CLJ 830), that there are
two types or classes of conspiracy actionable in tort, *viz*, (i)
I conspiracy to injure by the use of lawful means and (ii) conspiracy
to perform an unlawful act or to use unlawful means.

[35] The two classes of conspiracy to injure was explained in *Sorrel v. Smith and Others* in the following manner: A

A combination of two or more persons willfully to injure a man in his trade is unlawful, and, if it results in damage to him, is actionable, and malice in the sense of personal enmity, spite, or other evil motive need not be proved, but if the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, and by no means in themselves unlawful, then no wrong is committed and no action will lie although damage to another ensues. B

[36] Further in *Lonrho Plc*, the House of Lords held that: C

If the predominant purpose is to damage another person and damages results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it cause damage to another person. D

[37] In other words, a combination of persons to do some act, the natural consequence of which was to injure another in his business, was not actionable, if those acts were not otherwise unlawful, such as assaults, or threats of assaults, and were done in the furtherance of the trade interests of those combining. Conversely, a combination of persons to do some act the object of which is to injure some third person is wrongful and actionable, so too is a combination of persons to do some act by unlawful means which will have the effect of injuring some third person (see *Ware and De Freville, Ltd v. Motor Trade Association and Others* [1921] 3 KB 40). E F

[38] Coming back to the case before me, as rightly pointed out by learned counsel for D1 and D2, in order to succeed under the category of a predominant purpose to injure, plaintiff will have to demonstrate in its pleading that the sole or predominant purpose between D2 and D1, D3 and D4 to have the impugned clause was to cause injury to the plaintiff and those acts did cause the plaintiff to suffer pecuniary loss (see *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695; [1996] 2 AMR 3001 and *Seagate Technology (S) Pte Ltd & Anor v. Heng Eng Li & Anor* [1994] 1 SLR 534 HC, affirmed in the Court of Appeal decision in *Seagate Technology (S) Pte Ltd & Anor v. Goh Han Kim* [1995] 1 SLR 17). G H I

- A [39] Similarly, under the category of conspiracy to injure by unlawful means, the plaintiff must plead the details or particulars of the unlawful means used by D1 and D2 to insert the impugned clause in the contracts between them.
- B [40] In this case, it is not in dispute that the plaintiff has pleaded both classes of conspiracy in its SC. Conspiracy to injure by unlawful means was pleaded in para. 11 while the predominant intention to injure by the alleged lock-out clause was pleaded in para. 12.
- C [41] Paragraph 13 of the statement of claim amplifies para. 11 by defining what the “conspiracy by unlawful means” were, ie, the lock-out clause is part of an anti-competitive scheme and/or unfair competition and/or otherwise unfair business practices in order to monopolise and/or to wrongly dominate the relevant international market sectors for the defendants’ benefit and advantage.
- D [42] One of the issues raised by the defendants is that the SC of the plaintiff on its cause of action based on the conspiracy to injure is flawed and defective. The arguments on this issue both
- E of learned counsel for all the defendants and the plaintiff have been set out earlier in this judgment.
- F [43] Now the law with regard to pleading is very clearly laid down in O. 18 r. 12 of the RHC 1980, that is, every pleading of a party must contain the necessary particulars of its claim and in particular para. (b) requires that “where any party in its pleading alleges any condition of mind of any person, ... fraudulent intention or any other condition of mind except knowledge” he must state the particulars of the facts on which he relies.
- G [44] The importance of a pleading has been emphasised in the case of, *inter alia*, *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 3 CLJ 310 (cited by learned counsel for D4 in his submission) in which Abdul Malik Ishak JCA states at para. 42 of his judgment as follows:
- H [42] In regard to the objects of pleadings, Buhagiar J, in *Wong See Leng v. C Saraswathy Ammal* [1954] 1 LNS 133 had this to say:
- I Now as stated in *Bullen and Leake’s Precedents, of Pleadings*, 10th Edition page 1:

The principal objects of pleadings are firstly, to define the issues of fact and questions of law to be decided between the parties; secondly, to give to each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial; and thirdly, to provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and constitute a permanent record of the questions raised in the action, and of issues decided therein, so as to prevent future litigation upon matters already adjudicated upon between the litigants.

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[45] Coming back to the case before me, it is obvious from a reading of the SC that on the face of it the entire basis of the plaintiff's against the four defendants on the tort of conspiracy to injure is premised on the mere presence of the alleged lock-out clause in the 18 palm oil contracts entered into between D1 and D2.

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[46] However, I agree with learned counsel for all the defendants that apart from the bare recital of the 18 palm oil contracts made between the defendants incorporating the alleged lock-out clause as being offensive, the plaintiff fails to plead particulars of the unlawful means employed (for example, violence or threat or other illegal means or violation of statute, etc) by D1 or D2 and *vice versa* when inserting such clause into their contracts or the particulars or facts constituting the purported predominant intent to injure the plaintiff.

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[47] To be fair to the plaintiff, in para. 13 of its SC, it did plead that the alleged lock-out clause is a deliberate scheme to keep the plaintiff out of the string contract and to temper with free market forces and to corner or monopolise the market. Be that as it may, I am inclined to agree with learned counsel for D2 that these are general allegations and not particulars or facts in terms of how by D1 and D2 not selling to the plaintiff temper with free market or how by D1 and D2 deciding not to sell to the plaintiff caused them to monopolise the market?

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[48] In arriving at my aforesaid finding, I have taken note of the submission advanced by learned counsel for the plaintiff, Dato Seri Muhammad Shafee Abdullah, that it is not necessary for the plaintiff to plead evidence at this stage. I believe all parties are in

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- A agreement that by virtue of O. 18 r. 7 of the RHC 1980 only facts which a party intends to rely on for his claim needs to be pleaded but not the evidence by which those facts are to be proved.
- B [49] Hence, this court fully agrees with learned counsel for the plaintiff that at this stage of the proceedings the court is not looking at the evidence that the plaintiff will have to produce in order to prove the predominant intent or purpose to injure or the unlawful means to injure. No, not at all. Nevertheless as required
- C by O. 18 r. 7 of the RHC 1980, the fact remains that it is incumbent on the plaintiff to plead sufficient material facts and particulars in order to establish the various elements based on the tort of conspiracy to injure and to enable the defendants to answer the plaintiff's claim.
- D [50] The corollary of this rule is that where a particular or material fact is not pleaded in the plaintiff's SC, then no evidence can be led during the trial to prove the existence of that fact. This, I believe, has been succinctly laid down in a number of case laws, in particular the case of *Ranjit Kaur S Gopal Singh v. Hotel*
- E *Excelsior (M) Sdn Bhd* [2010] 3 CLJ 310 cited earlier in which Abdul Malik Ishak JCA, held, *inter alia*, as follows:
- [43] In the absence of pleadings, evidence if any produced by the parties cannot be considered by the court and no party
- F should be permitted to travel beyond its pleadings. All the necessary and material facts should be pleaded by the party in support of the case set up by the said party (*Ram Sarup Gupta (dead) by L. Rs. v. Bishun Narain Inter College and others*, AIR [1987] SC 1242; and *K Kanakarathnam v. A Perumal and another*, AIR [1994] Mad 247). According to the
- G case of *Hari Chand v. Daulat Ram*, AIR [1987] SC 94, no evidence can be led on a fact not pleaded. Neither is it open to the parties to give up its case set out in the pleadings and propound an entirely new and different case (*Vinod Kumar Arora v. Smt. Surjit Kaur*, AIR [1987] SC 2179 at
- H 2183).
- [51] The idea of requiring the plaintiff to lay all its cards on the table in its SC is so that the defendants know before hand the exact nature of the case they have to answer and to prevent trial by ambush especially during the introduction of evidence where
- I objection will certainly be raised of a fact which has not been specifically pleaded.

[52] In the light of the above discussions, I am in full agreement with counsel for the defendants that the plaintiff's pleading as it stands is flawed or seriously wanting in that apart from making general allegations of a combination between D1 and D2 to injure the plaintiff *vide* the alleged lock-out clause, the pleading is devoid of particulars necessary to establish all the elements premised on a claim of conspiracy to injure.

[53] The mere reference to the alleged lock-out clause does not and cannot sustain plaintiff's cause of action based on the tort of conspiracy to injure. In this regard I accept the principles laid down in the English case of *Jarman & Platt Ltd v. L Barget Ltd and Others* [1977] FSR 260 (cited by learned counsel for D2) that since a charge of conspiracy in civil proceedings is generally to be regarded as a grave charge and that particularly where the allegation is made against persons of hitherto unblemished reputation, the standard of proof which has to be established before a court can properly hold that the charge is established is a high one, commensurate with the seriousness of the charge and such allegation must be clearly pleaded and clearly proved by convincing evidence. I further adopt the decision in the Malaysian case of *Gasing Heights Sdn Bhd* in which Mahadev Shanker J (as he then was) held that just as fraud must be pleaded with great particularity, so also all the constituent ingredients going to make up conspiracy, must be pleaded. On this ground alone the claim for conspiracy fails and the plaintiff's claim ought to be dismissed under O. 18 r. 19 of the RHC 1980.

[54] It is pertinent to note that on the part of the D1 and D2, they had pleaded in their respective statement of defence that the object and/or intention of the alleged lock-out clause was not to injure the plaintiff's business interest and/or to cause loss to the plaintiff by unlawful means, but to protect the lawful object and/or intention of promoting the defendants' own legitimate business and/or economic interests, ie, safeguarding its shareholders' interest.

[55] D1 and D2 had also pleaded that they have the freedom to pursue their own interests in their trade and that there was no unlawful means employed by them, such as fraud, threat or violence or any act contrary to law, against each other or other parties in the string to cause loss to the plaintiff. On the other

- A hand, plaintiff completely failed to plead what were the overt unlawful acts employed by D1 and D2 to intimidate or threaten each other and or other parties in the string not to trade with plaintiff.
- B [56] In fact all parties in this case including plaintiff are in agreement that in a PORAM string contract palm oil is sold and resold a few times, beginning with the first seller in the string to the intermediary until a final contract is entered into with the final physical purchaser. A string contract can involve up to 17, 20, 30 or more parties in each string. In this case, it is also not in dispute that the alleged lock-out clause merely states that D1 and C D2 agree that their immediate counterparty shall not be Pacific Inter-Link (ie, the plaintiff). Since a string contract may involve from 17 to 30 or more other parties, that clause does not stop D the other parties in the string from contracting with the plaintiff. D1 and D2 had explained that the true intention of the alleged lock-out clause was to safeguard their own lawful and legitimate business interest which under a free market, D1 and D2 were perfectly entitled to do. Further, the alleged offending clause, E being a term of the contract between D1 and D2, had to be communicated between D1 and D2 in order to give effect to their mutual understanding.
- F [57] In regard to the plaintiff's claim against D3 and D4, this court is of the similar view and agree with learned counsel for D3 and D4 that the plaintiff's SC against D3 and D4 on the tort of conspiracy to injure as it stands is defective as it has failed to plead any particulars or facts as to how and by what means D3 and D4 had abetted, aided or assisted D1 and D2 to injure the plaintiff by the said lock-out clause.
- G [58] I also find considerable merit in the submission made on behalf of D3 and D4 by their respective learned counsel as outlined earlier in this judgment to which I fully agree that the plaintiff's claim against D3 and D4 is misconceived. This is because H the only basis of the plaintiff's claim against them would appear to be that they had brokered 18 palm oil contracts between D1 and D2. I agree with learned counsel that as mere brokers D3 and D4 played no part in the formulation of the terms of the contract which were agreed to between their principals. D3's and D4's I only role was to bring together D1 and D2 and they were not in a position to dictate the terms of the contract.

[59] 1 further agree with the submission of learned counsel for D3 and D4 that the plaintiff's claim against D3 and D4, merely by virtue of their having brokered the contracts between D1 and D2 and nothing more, is a frivolous and vexatious claim and an abuse of the process of the court as it would appear to be a claim made with an ulterior motive, to obliquely force D1 and D2 through D3 and D4 to trade with the plaintiff which they do not wish to.

[60] As regards the quantum of damages or losses allegedly suffered by the plaintiff as a result of the alleged lock-out clause in the 18 palm oil contracts, the plaintiff has pleaded very specifically that it has suffered loss and damage as a result of the conspiracy between D1 and D2 in that it has to pay artificially inflated prices to secure alternative palm oil cargoes for fulfilling its contractual commitments to its customers and also has suffered losses by way of demurrage and dead freight paid to various ship owners and/or charterers arising from the plaintiffs inability to secure cargoes timeously and/or by giving discounts to its customers to retain their confidence as particularised in para. 15 of the SC as follows:

- (a) Loss suffered in purchase and sales of RBD palm oil in FOB market: USD106 million;
- (b) Demurrage and dead freight paid to various ship owners and/or charterers and extra daily hire, extra bunker expenses incurred in vessels waiting for cargo at various ports: USD7.2 million;
- (c) Discounts to destination customers: USD126 million;
 - (i) Late shipment, arrival penalties imposed by customers due to delay in shipments: USD5 million;
 - (ii) The plaintiff will render full particulars of the loss and damage upon discovery and/or interrogatory process in this action.

[61] In the premises the plaintiff claims general damages for intentional interference with economic interests, conspiracy and demurrage claim in the amount of USD244,200,000.

- A [62] On this issue, having considered the respective submission of learned counsel for all the parties on the issue on quantum, this court again concur with the submission of learned counsel for D1 and D2 and lean in favour of their arguments that the plaintiff's pleading in para. 15 is equally flawed for various reasons.
- B [63] This is because while para. 15 sets out in precision what the plaintiff had purportedly suffered in monetary terms as a result of the alleged conspiracy between D1 and D2, ie, USD244.2 million to be precise, between 2005 - 2011, it has however completely
- C failed to plead the material facts and particulars to support and or justify the whopping figures of the claim. Surely plaintiff cannot simply aver that it has incurred these amounts of pecuniary losses because of the alleged lock-out clause without full particulars of the number of occasions that plaintiff had requested but D1 and
- D D2 refused to sell to plaintiff palm oil, the alleged inflated prices that it was forced to pay to third parties and the prices that it would have paid D1 and D2 had it been able to buy palm oil cargoes from the D1 and D2. I agree with D2 that if the plaintiff can plead a precise figure of the losses or damages it had suffered,
- E ie, USD244,200,000 as a result of the alleged lock-out clause, then it must surely mean that plaintiff has with it particulars and facts upon which it had relied upon in arriving at its figures, which it is incumbent on the plaintiff to plead.
- F [64] In this regard, learned counsel for the D2 has also pointed out to this court that in para. 20 of the reply to the defence, the plaintiff has acknowledged that it was not even aware of the lock-out clause until January 2011. This court accepts the argument that if the plaintiff only knew of the existence of the lock-out
- G clause in January 2011, its complaint that for the past five-six years it has been forced to buy at artificially inflated prices does not stand to reason. How could plaintiff feel the effect of the alleged lock-out clause when it was not even aware of its existence?
- H [65] Learned counsel for the plaintiff in his submission has stated that in reality the so-called particulars which are lacking as complained by the defendants are more in the nature of evidence and it is trite law that the plaintiff is not required to plead evidence in its SC.
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[66] Learned counsel has also submitted that if indeed particulars are what required by the defendants, the usual thing would have been for them to write to the plaintiff to ask for these particulars and if the plaintiff unreasonably refuses the defendants could have gone under the process of discovery and interrogatories for further and better particulars.

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[67] Learned counsel has further submitted that the plaintiff has pleaded in para. 14 of the SC that the plaintiff is still in the process of discovery for more contracts between D1 and D2 containing such a lock-out clause and reserves its right to add to and refer to other contracts executed between D1 and D2 and between them and the other parties in the trade upon discovery/interrogatories and if need be the plaintiff will apply to amend the SC to bring in more parties and to plead further particulars and further losses it had suffered.

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[68] Learned counsel for the plaintiff has also relied on the decisions in the cases of, *inter alia*, *AIC Dotcom Sdn Bhd v. MTEX Corporation Sdn Bhd & 2 Ors* [2009] 1 LNS 118; [2011] 3 MLJ 476 CA and *Kuala Lumpur Finance Berhad v. KGV & Associates Sdn Bhd* [1995] 1 CLJ 519; [1995] 1 MLJ 504 at 508 HC, that in civil proceedings where there are defects in the pleading of a party resulting in the other party applying to strike out, if an amendment can correct the defects, the court generally would not act summarily to strike out the claim/defence and leave under the rule will always almost be given to allow the party to amend its pleading.

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[69] This court is of the view that these submissions of learned counsel for the plaintiff are misplaced and misconceived, for the following reasons.

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[70] Firstly, it is the duty of the plaintiff when filing such a huge amount of claim against the defendants to ensure that all material facts and particulars necessary to establish its claim are pleaded and in order to formulate a complete cause of action against the defendants. Secondly, I agree with learned counsel for D1 and D2 that we are not talking about other possible contracts which might be discovered in the future by the plaintiff or about the other potential parties who might be brought into the present suit. For the purpose of the present striking out applications this court needs only to look at the existing pleading in the SC to see if it is sufficient to sustain the plaintiff's present cause of action or

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- A support the claim which as earlier discussed, is clearly flawed and wanting. Thirdly, it is certainly not the responsibility of the defendants, where the SC is defective and or wanting, to apply for better and further particulars in order to assist the plaintiff to sustain or improve its pleading. Fourthly, I concur with learned
- B counsel for D2 that it is one thing to say that the court ought to allow a party to amend its pleading to add further particulars in order to supplement its existing particulars, it is a different thing altogether, when a pleading is obviously unsustainable to begin with, to say that the court ought to exercise its discretion to allow
- C that party to amend its pleading just so it can sustain an obviously unsustainable claim.

- [71] This court is also of the considered view that the plaintiff's plea that it is still looking for further contracts and other potential
- D parties to be brought in as parties to this suit smacks of a fishing expedition which the court must vigilantly guard against. In this regard, I wish to refer to the case of *Duta Arif Sdn Bhd & Ors v. Charterfield Corporation Sdn Bhd & Ors* [2007] 1 LNS 415 in which Hamid Sultan JC (as he then was) quoted the following passage
- E from the case of *Thomas & Betts (SE Asia) v. Ou Tin Joon* [1998] 1 SLR (R) 380 mentioned in *Tapematic SpA v. Wirana Pte Ltd & Anor* [2002] 4 SLR 953 which reads as follows:

- F The particulars given by the Appellants/Plaintiffs were at best vague and sweeping. It seemed to me that the Appellants/Plaintiffs were merely trying to frame their claim in the widest possible terms without the requisite particulars. It is a clear rule of pleading that 'every pleading must contain the necessary particulars of any claim (O. 18 r. 12(1) of the RSC). In the
- G absence of providing adequate particulars, and in the absence of any explanation as to why these particulars were inadequate, I was constrained in the finding that there were insufficient facts in the pleadings to support the cause of action. I did not think it fair that a Appellants/Plaintiffs should be allowed to allege first, and then through the process of discovery or interrogatories, hope to substantiate those allegations later - that would be tantamount
- H to 'fishing' which any court would vigilantly guard against in balancing the interests and rights of the parties concerned.

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Claim Based On Defamation**A**

[72] In regard to plaintiff's claim based on the tort of defamation, having considered and evaluated the respective submission of counsel for all the parties as outlined above, I am inclined to agree with learned counsel for all the defendants, for the reasons stated by them in their submissions, that as it stands the plaintiff's pleading discloses no reasonable cause of action against the defendants based on the tort of defamation. In particular, I uphold D4's submission that the plaintiff's pleading is flawed by virtue of O. 78 r. 2 of the RHC 1980.

B**C**

[73] In conclusion, based on the foregoing finding, I hereby allow encls. (8), (10), (14) and (15) with costs.

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